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586514—44

# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 894

WALTER JUDSON LUNDGREN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner was charged in a one-count indictment filed in the United States District Court for the District of Arizona with having unlawfully and knowingly failed to report for a final-type physical examination as ordered by his local draft board, contrary to the duty imposed on him by the Selective Training and Service Act of 1940 (50 U. S. C. App. 301, *et seq.*) and the rules and regulations issued thereunder (R. 2–5). At the trial before a jury, the Government's proof showed that petitioner registered with his local board on

October 16, 1940, and filed the regular questionnaire (see R. 64–66). On January 27, 1941, he was classified 1–A (available for general military service), and after receiving a physical examination he was reclassified IV–F (physically, mentally, or morally unfit). Thereafter, on January 1, 1943, he was again physically examined and as a result thereof he was reclassified I–A (R. 67–68). On January 14, 1943, petitioner filed the regular conscientious objector form, claiming that as a member of Jehovah's witnesses he had conscientious objections to both combatant and non-combatant service (R. 72–73, 83–84). Pursuant to this declaration, the local board reclassified him IV–E (conscientious objector to combatant and noncombatant service) (R. 67). He did not appeal from this classification (R. 69). On February 8, 1943, the board ordered petitioner to report on February 19, 1943, for a final-type physical examination (R. 73–74). He did not report at that time or at any other time (R. 74).

Petitioner testified in his own defense that he had served in the Army from June 26, 1929, to July 8, 1930 (R. 81); that when he notified his local board that he was a conscientious objector, he thought he would be classified as a minister of religion (R. 87); that he received the order to report for a final-type physical examination (R. 85); and that he refused to report pursuant to the board's order because his religious beliefs

would not permit him to do so (R. 86, 89, 93). The court rejected further proffered testimony concerning his religious beliefs, as well as testimony calculated to show that he was a minister (R. 84–88, 92–94).

The court instructed the jury, *inter alia,* that the crime charged was that petitioner had knowingly, wilfully, unlawfully, and feloniously failed and neglected to report as directed by his local board and that petitioner was not entitled to challenge his Selective Service classification as a defense to that charge (R. 96, 98).

Petitioner was convicted (R. 11–13) and sentenced to imprisonment for three years (R. 15). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit the conviction was affirmed (R. 109).

Petitioner does not deny that he was cognizant of his duty under the Selective Training and Service Act of 1940 and that he failed to perform it. Instead, his principal contention is that the trial court improperly refused to permit him to show by his own testimony that he did not have a criminal intent because he believed that he was a minister and because he was acting pursuant to his religious beliefs (Pet. 13–16). This contention is wholly without merit.

Section 11 of the Act makes it a criminal offense for any person charged with a duty under the Act or regulations "knowingly" to fail or

neglect to perform that duty. That petitioner knew of his duty to report for a physical examination and that he deliberately failed to do so is clear from his own testimony.[1] Nothing more was required. *Browder* v. *United States,* 312 U. S. 335, 340–342; *United States* v. *Illinois Central R. R. Co.,* 303 U. S. 239, 242–243; cf. *Falbo* v. *United States,* 320 U. S. 549. Hence, not only would there have been no relevance in a showing that petitioner was motivated in his refusal to report by his religious beliefs, but also even if such evidence had been admitted, it would not in any manner have divested petitioner's failure to report of that quality of wilfulness required by Section 11 of the Act.[2]

Since exemption from military service is the result of congressional discretion rather than constitutional mandate (*United States* v. *Macintosh,* 283 U. S. 605, 622; *Hamilton* v. *Regents,* 293 U. S. 245, 263–264; *Rase* v. *United States,* 129 F. (2d) 204, 210 (C. C. A. 6)), the refusal of the trial

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[1] *United States* v. *Hoffman,* 137 F. (2d) 416 (C. C. A. 2), relied upon petitioner (Pet. 6–7) as showing a conflict of decisions among the circuits, requires, in the terms of Section 11 of the Act, that the defendant must knowingly fail or neglect to perform a statutory duty and, of course, is thus perfectly consistent in principle with the judgment of the court below.

[2] For the same reasons, the trial court properly rejected petitioner's requested instructions to the effect that the jury must find that he had a criminal intent (R. 49–50, 102; see Pet. 19–21).

court to admit evidence of petitioner's religious beliefs was not in any sense a denial of petitioner's religious liberty, as he contends (Pet. 17–19).

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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